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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. MARQUIS REMBLE, Defendant and Appellant.	B213487 (Los Angeles County Super. Ct. No. NA069306)

APPEAL from a judgment of the Superior Court of Los Angeles County, Hayden Zacky, Judge. Modified and, as so modified, affirmed.

Barbara A. Smith, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown Jr., Attorney General, Dane R. Gillette and Pamela C. Hamanaka, Assistant Attorneys General, Lance E. Winters and Analee J. Brodie, Deputy Attorneys General, for Plaintiff and Respondent.

I.

INTRODUCTION

Defendant and appellant Marquis Remble was sentenced to 13 years in prison after he violated his probation that had been granted on his attempted second degree robbery plea. Appellant appeals from an order revoking his probation and sentencing him to 13 years in state prison. He contends: (1) he could not be sentenced to prison for 13 years because the grant of probation was unauthorized; and (2) the trial court erred in imposing a second restitution fine.

We hold that appellant is foreclosed from arguing that he could not be sentenced to state prison upon his violation of probation. We also hold that the trial court made a number of errors in imposing fines, which we have corrected. We affirm the judgment as modified.

II.

FACTUAL AND PROCEDURAL BACKGROUND

Because appellant accepted a plea, the facts have been ascertained from the preliminary hearing record and statements contained in the probation report.

On February 22, 2006, Mr. Ki Duk Kim, also known as Mr. Kwon Kim, and his wife were working in their market in Torrance, California. Appellant and Payten Grimmett[1] entered the market. Grimmet asked about the price of a couple of items and asked how much money was in the cash register. One of the men put a gun to Mr. Kim's face. Mr. Kim pushed the man and the gun dropped to the floor. Then, one of the assailants repeatedly hit Mr. Kim with the gun. Appellant and Grimmet ran to a vehicle that was parked nearby, with the engine running.

Appellant, who had stabbed himself in the abdomen, was arrested at the Harbor-UCLA Medical Center.

On August 10, 2006, appellant entered an open plea of no contest to one count of attempted second degree robbery (Pen. Code, §§ 211/664) and admitted he had

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1 Payten Grimmett has also been identified in the appellate record as Peyton Grimmet.

personally used a firearm in the commission of the offense (Pen. Code, § 12022.53, subd. (b)). Appellant admitted knowing that if he violated probation he would go to prison. Among other waivers, appellant waived his right to appeal. Over the objection of the prosecutor, the superior court sentenced appellant to 13 years in state prison. The court imposed a restitution fine of $200 (Pen. Code, § 1202.4, subd. (d)). The sentence was suspended, appellant was placed on formal probation for five years, and he was to spend the first year in county jail.

On January 9, 2009, appellant was found in violation of his probation for failing to report to his probation officer, failing to make restitution payments, failing to submit proof that he had found a job or enrolled in school, testing positive for prescriptive drugs without having a prescription, testing positive for methamphetamine, failing to attend counseling, failing to submit to drug testing, driving with a suspended license, and stealing a car which he used to flee after committing a petty theft from a convenience store. The court revoked appellant's probation and imposed the 13-year state prison term. The court also imposed a $2,600 restitution fine (Pen. Code, § 1202.4, subd. (b)) and a $2,600 parole revocation fine (Pen. Code, § 1202.45).

Appellant appealed.

III.

DISCUSSION

A. *Appellant has waived his rights to argue that he cannot be sentenced to 13 years in prison.*

Appellant does not challenge the validity of his plea. Appellant does not contend the 13 year sentence was illegal. Rather, he argues that the grant of formal probation was illegal and thus, upon violation of that probation, the 13 year sentence should be set aside so he might seek a shorter prison term. We are not persuaded.

Appellant is correct when he states that on August 10, 2006 the trial court was not authorized to impose a 13 year state prison sentence. Penal Code section 1203.06, subdivision (a)(1) provides that probation shall not be granted to persons who personally use a firearm during the commission or attempted commission of specified crimes,

including robbery. (See *People v. Rodriguez* (1986) 42 Cal.3d 1005, 1018-1019 [upholding prohibition against probation for using a firearm in commission of a specified offense]; *People v. Gonzales* (1979) 96 Cal.App.3d 725.) Further, the firearm use enhancement applicable to robbery prohibits probation grants. (Pen. Code, § 12022.53, subd. (g).)

However, the superior court did not lack jurisdiction in the fundamental sense of being unable to preside over the case. Rather, when it granted appellant probation, the court committed an act in excess of its statutory authority to grant probation, an act in excess of its jurisdiction. Appellant may waive his rights to object to this type of unauthorized act – which he did. (*People v. Saunders* (1993) 5 Cal.4th 580, 590; *People v. American Contractors Indemnity Co.* (2004) 33 Cal.4th 653, 661.)

If the grant of probation was improper when it was imposed and when the sentence was suspended, appellant could have appealed at that time. He did not. Thus, the time has passed for him to protest. Appellant may not challenge the sentence that was imposed a long time ago and is final. (*People v. Howard* (1997) 16 Cal.4th 1081, 1090-1091.) "An order granting probation is identified in [Penal Code,] section 1237 as a 'final judgment' for purposes of taking an appeal. [Citations.] Defendant then had the opportunity to challenge the [sentence] with an appeal from the judgment. [Citations.] When the time for appeal lapsed during the probationary period, the sentence became 'final and nonappealable.' [Citations.]" (*People v. Amons* (2005) 125 Cal.App.4th 855, 868-869, fn. omitted.)

Further, before he entered his appeal, appellant acknowledged he had a right to appeal and stated he was giving up that right. Appellant does not suggest his waiver was ineffective. Also, to the extent appellant tries to argue the waiver does not apply because he could not have contemplated events occurring in the future (*People v. Panizzon* (1996) 13 Cal.4th 68, 85-86), such an argument misses the mark. There are no unanticipated events here. When appellant pled no contest, appellant knew he would be sentenced to 13 years in prison if he violated probation and he knew he had given up his right to

appeal that sentence. These provisions were integral to his bargain to which he must abide. (*People v. Panizzon, supra,* 13 Cal.4th 68.)

Additionally, appellant received the benefits of probation as he was not sentenced to prison when he entered his plea. He cannot accept the benefits of a suspended sentence, which could have kept him out of prison had he complied with the terms of probation, and then violate that probation and seek a shorter sentence. In *People v. Howard, supra,* 16 Cal.4th 1081, the Supreme Court stated "that, if the court has actually imposed sentence, and the defendant has begun a probation term representing acceptance of that sentence, then the court has no authority, on revoking probation, to impose a lesser sentence at the precommitment stage. [A]lthough defendant appealed the denial of her motion to set aside her guilty plea, she did not contest the validity of the sentence the court imposed when granting probation. No good reason exists for allowing her to do so once the court revoked her probation." (*Id.* at p. 1095.) Similarly, here, appellant did not protest the validity of the sentence when it was imposed and cannot do so now.

The Supreme Court in *People v. Tanner* (1979) 24 Cal.3d 514, 518 to 522, addressed the proper remedy for an illegal grant of probation. *Tanner* determined that the trial court had unlawfully granted the defendant probation and a one-year jail term rather than send him to prison. Because the defendant had completed both the jail term and probation and because sending the defendant to prison for a second incarceration would have been unjust, the Supreme Court "declined to order the defendant to serve the required prison term. [Citation.]" (*People v. Statum* (2002) 28 Cal.4th 682, 697.) Thereafter, in *People v. Statum, supra,* at pages 695 to 697, the Supreme Court questioned whether *Tanner* continued to be controlling in situations in which there had been an illegal grant of probation. *Tanner* noted that a defendant's legitimate expectations would be defeated if their sentences were increased after an appeal. However, *Statum*, stated that even if *Tanner* remained good law, it had been limited. *Statum* stated: "the Courts of Appeal have limited *Tanner* to circumstances in which (1) the defendant has successfully completed an unauthorized grant of probation; (2) the defendant has returned to a law-abiding and productive life; and (3) 'unusual

circumstances' generate a 'unique element' of sympathy, such that returning the defendant to jail 'would be more than usually painful or "unfair." ' (*People v. Lockridge* (1993) 12 Cal.App.4th 1752, 1759 [collecting cases].)" (*People v. Statum, supra,* at pp. 696-697, fn. 5.) *Statum* did not reach the same result as that in *Tanner* stating that "[*e*]*ven if Tanner* remains good law, defendant cannot satisfy this test." (*People v. Statum, supra,* at p. 697, fn. 5, italics added.)

Here, *even if People v. Tanner, supra,* 24 Cal.3d 514 is good law, appellant does not meet its criteria. Appellant has not successfully completed the unauthorized grant of probation; appellant has not returned to a law-abiding and productive life; and the circumstances are not such as to generate a unique element of sympathy, such that returning appellant to prison would be more than usually painful or unfair. While on probation, appellant failed to report to his probation officer, failed to make restitution payments, failed to submit proof that he had found a job or enrolled in school, tested positive for drugs, drove without insurance and without proof of insurance, and stole a car and then used the stolen car to flee after committing a petty theft from a convenience store.

Thus, we reject appellant's argument that we should set aside his sentence and remand to the trial court for resentencing.

B. *The trial court erred in imposing a second restitution fine and made other errors with regard to fines.*

Appellant contends, and the People concede, that the trial court erred in imposing a $2,600 restitution fine (Pen. Code, § 1202.4, subd. (b)) at his probation violation hearing because the first restitution fine in the sum $200 fine was already in effect. (*People v. Chambers* (1998) 65 Cal.App.4th 819, 822 [trial court has no statutory authority to order a second restitution fine upon revocation of probation because the restitution fine imposed as a condition of probation remained in force]; accord, *People v. Arata* (2004) 118 Cal.App.4th 195, 202-203; Pen. Code, § 1202.4, subd. (m).)

The People point out an additional error. The trial court erred in imposing the corresponding parole restitution fine (Pen. Code, § 1202.45) as it must be in the same

amount as the restitution fine. (*People v. Arata, supra,* 118 Cal.App.4th at p. 203; *People v. Guiffre* (2008) 167 Cal.App.4th 430, 434.) Therefore, the parole restitution fine must be reduced to $200.

Further, as the People note, when the trial court imposed a $200 restitution fine (Pen. Code, § 1202.4, subd. (b)), the court was required to impose a suspended $200 probation revocation restitution fine (Pen. Code, § 1202.44). (*People v. Guiffre, supra,* 167 Cal.App.4th at p. 434.) Since probation has now been revoked, the trial court is required to lift the stay of the probation revocation fine and that fine is now due. Appellant contends that the probation revocation fine cannot be imposed because probation should not have been granted. However, by accepting the erroneous grant of probation, appellant effectively waived his right to suggest that a probation revocation fine would have been improper.

IV.

DISPOSITION

The abstract of judgment is modified to reflect that (1) the $2,600 restitution fine (Pen. Code, § 1202.4, subd. (b)) is stricken; (2) the $2,600 parole revocation fine (Pen. Code, § 1202.45) is reduced to $200; and (3) a $200 probation revocation fine (Pen. Code, § 1202.44) is imposed and is now due and payable.

The Clerk of the Superior Court is directed to forward a certified copy of the corrected abstract of judgment to the Department of Corrections and Rehabilitation. As modified, the judgment is affirmed.

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ALDRICH, J.

We concur:

KLEIN, P. J.

KITCHING, J.